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No.

In the Supreme Court of the United States

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(42)(A), an alien qualifies as a "refugee," and therefore is eligible for asylum, if, *inter alia*, the alien is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of * * * membership in a particular social group." The question presented is as follows:

Whether a group must be "socially visible" and "particularized," as the Board of Immigration Appeals requires, in order to qualify as a "particular social group" for purposes of the INA.

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PETITION FOR A WRIT OF CERTIORARI

Balmoris Alexander Contreras-Martinez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is unreported. The decisions of the Board of Immigration Appeals (App., *infra*, 6a-8a) and the immigration judge (App., *infra*, 9a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

In relevant part, the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42), provides:

> The term "refugee" means (A) any person who is outside any country of such person's nationality * * * and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

STATEMENT

After fleeing from El Salvador to the United States, petitioner applied for asylum, contending that he possessed a well-founded fear of persecution if he returned to El Salvador on account of his refusal to join a gang. An immigration judge denied petitioner's application, App., *infra*, 9a-27a, and the Board of Immigration Appeals dismissed petitioner's appeal, *id.* at 6a-8a. The court of appeals denied petitioner's petition for review. *Id.* at 1a-5a.

1. a. In 1980, Congress passed the Refugee Act, the Nation's first comprehensive legislation relating to asylum. See Pub. L. No. 96-212, 94 Stat. 102. The purpose of the Refugee Act was to "give the [government] sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the

world." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citation omitted).

The provisions of the Refugee Act are codified as part of the Immigration and Nationality Act (INA). As amended, the INA provides that the Attorney General and the Secretary of Homeland Security may, in their discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). Where the alien is in removal proceedings, the alien applies for asylum to the immigration judge with jurisdiction over the proceedings, and the Board of Immigration Appeals (BIA) hears any ensuing appeal. See 8 C.F.R. 1240.1 (a)(1), 1240.15. The Attorney General has the ultimate authority to review any decision of the BIA. See 8 C.F.R. 1003.1(h).

The INA defines a "refugee" to include an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).[1] That definition is drawn from the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577—which, in turn, incorporated a definition contained in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

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[1] Similarly, where the alien is in removal proceedings, he may be entitled to *mandatory* withholding of removal if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A).

Of the five bases for persecution set out in Section 1101(a)(42)(A), "membership in a particular social group" has proven to be the most difficult to interpret and apply. See, *e.g.*, *Fatin* v. *INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.) (noting that "[b]oth courts and commentators have struggled to define 'particular social group'"). The statute contains no definition of the phrase, and neither the legislative history of the statute nor the history of the international agreements on which it was based sheds any helpful light on the phrase's meaning. See *id.* at 1239. This case concerns the question whether a group must be "socially visible" and "particularized" in order to qualify as a "particular social group" for purposes of the INA.

b. The BIA has issued a series of decisions concerning the definition of "particular social group." In the leading decision, the BIA interpreted "particular social group" to mean "a group of persons all of whom share a common, immutable characteristic." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). In adopting that interpretation, the BIA reasoned that the definition of "refugee" also refers to race, religion, nationality, and political opinion, and that "[e]ach of these grounds describes persecution aimed at an immutable characteristic." *Ibid.* The BIA explained that, in order to be "immutable," the characteristic "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Ibid.* For two decades after its decision in *Acosta*, the BIA focused on the existence of an "immutable characteristic" in determining whether an alien was a member of a "particular social group." See, *e.g.*, *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997); *In re H-*, 21

I. & N. Dec. 337, 343 (B.I.A. 1996); *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996).

More recently, however, the BIA has engrafted two additional requirements onto its definition of "particular social group": *viz.*, whether the group "possess[es] a recognized level of social visibility" and "ha[s] particular and well-defined boundaries." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).[2] Although the BIA initially suggested that "social visibility" and "particularity" were merely factors in a holistic analysis, see, *e.g.*, *In re C-A-*, 23 I. & N. Dec. 951, 957 (B.I.A.), review denied *sub nom. Castillo-Arias* v. *U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007), it has since made clear that those considerations are "require-[ments]" for "membership in a purported social group." *S-E-G-*, 24 I. & N. Dec. at 582. In fact, in the BIA's most recent decisions, the social-visibility and particularity requirements have effectively supplanted the immutability requirement as the primary focus of the inquiry. See, *e.g.*, *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) (concluding that the proposed social group "lack[ed] the social visibility that would allow others to identify its members as part of such a group").

2. a. It is no overstatement to say that El Salvador "is captive to the growing influence and violence of gangs." U.S. Agency for International Development, Bureau for Latin Am. & Caribbean Affairs, *Central*

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[2] The BIA recently reopened proceedings in *S-E-G-* for the limited purpose of affording some of the asylum applicants a new hearing based on their status as unaccompanied minors. See Gov't Br. 20 n.8, *Ramos* v. *Holder*, No. 09-1932 (7th Cir. Aug. 10, 2009); Opp. to Pet. for Reh'g En Banc at 14-15, *Orellana-Monson* v. *Holder*, No. 08-60394 (5th Cir. Aug. 18, 2009). The reopening does not appear to affect the precedential status of the BIA's decision.

America and Mexico Gang Assessment 34, 44 (2006). Perhaps the most notorious of those gangs is Mara Salvatrucha (MS-13), a "sophisticated organization[]" with a "complex, clandestine hierarch[y]." Harvard Law School Human Rights Program, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 25, 28 (2007). The Salvadoran police has been unable to control the activities of gangs such as MS-13, and, as a result, youths who live in areas dominated by gangs "simply have no choice" as to whether to join. *Id.* at 30; see *id.* at 61-62. Gangs such as MS-13 have targeted youths who refuse to join, along with their families, for physical abuse and even death. See *id.* at 30; C.A. App. 235.

b. Petitioner is a Salvadoran national. He grew up in El Salvador; when he was four years old, his mother fled to the United States and obtained asylum, and he was raised by a series of other family members. As a teenager, petitioner refused to join MS-13, even though most of the students at his school were members. He grew up as an Adventist, and he later testified that the violent activities of MS-13 were "against all the values [he] had learned" in his faith. Because of his refusal to join MS-13, petitioner was constantly harassed by gang members, who would push, slap, and taunt him. A female classmate was gang-raped and killed, apparently for refusing to join the gang. App., *infra*, 10a, 11a-12a; C.A. App. 89-96.

In 2004, a group of approximately fifteen to twenty gang members attacked petitioner as he was walking home from school, beating him and hitting him with rocks. During the attack, petitioner was offered one last chance to join the gang; once again, he refused. A gang member then pointed a pistol at petitioner's head and said, "Today you die." Petitioner heard a voice say someone was coming; he then passed out. His cousin lat-

er told him that, when the police had found him lying injured, they laughed and said there was nothing they could do. The police never filed an official report of the incident, and, to the best of petitioner's knowledge, the perpetrators were never caught. App., *infra*, 22a; C.A. App. 97-98.

Petitioner suffered multiple injuries and required hospitalization for several days. Shortly after returning home, he received a note from MS-13 threatening to kill him if he revealed who had attacked him. Approximately two days after receiving the note, petitioner withdrew his life savings and fled to the United States. After a lengthy and difficult journey through Guatemala and Mexico, he was apprehended by American immigration officials near Brownsville, Texas; he was allowed into the country and currently lives with his brother in Gaithersburg, Maryland. App., *infra*, 10a; C.A. App. 89, 98-99.

3. U.S. Immigration and Customs Enforcement initiated removal proceedings against petitioner. Petitioner conceded that he was removable but, as is relevant here, timely applied for asylum, contending that he was unable or unwilling to return to El Salvador because he possessed a well-founded fear of persecution on account of his refusal to join MS-13.[3] After a hearing, an immigration judge denied petitioner's application. App., *infra*, 9a-27a.

As a preliminary matter, the immigration judge determined that petitioner was credible, reasoning that his

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[3] Petitioner also sought both withholding of removal under the INA and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85. Those claims were rejected below, see App., *infra*, 5a, 8a, 25a-26a, and neither of those claims is at issue in this petition.

testimony was "candid, detailed, and for the most part, consistent." App., *infra*, 21a. The judge also determined that petitioner "has been the victim of persecution in the past," based, *inter alia*, on the 2004 assault. *Id.* at 22a. The immigration judge, however, ultimately concluded that petitioner could not show that his persecution was inflicted on account of membership in a particular social group. *Id.* at 24a. The judge reasoned that "th[e] claimed social group"—*viz.*, of Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities—was "too tenuous to qualify" as a "particular social group" under Section 1101(a)(42)(A). *Ibid.* The judge also suggested that petitioner had failed to show that he was persecuted "on account of" his membership in that group: *i.e.*, that there was a nexus between the persecution and group membership. *Ibid.*

4. The Board of Immigration Appeals dismissed petitioner's appeal. App., *infra*, 6a-8a. The BIA determined that petitioner's proposed social group was "too broad and ill defined to constitute a discrete particular social group within the meaning of the [INA]." *Id.* at 7a. In so doing, the BIA cited its decision in *S-E-G-* for the specific proposition that Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities do not "constitute a 'particular social group.'" *Ibid.*; see *id.* at 8a (citing *E-A-G-* for the proposition that "'persons resistant to gang membership' does not constitute a particular social group").

5. The court of appeals denied petitioner's petition for review. App., *infra*, 1a-5a.

As is relevant here, the court of appeals explained that "the [BIA] has defined 'persecution on account of membership in a particular social group' within the meaning of the INA to mean persecution that is directed toward an individual who is a member of a group of per-

sons all of whom share a common, immutable characteristic." App., *infra*, 4a (internal quotation marks omitted) (quoting *Acosta*, 19 I. & N. Dec. at 233). The court of appeals added, however, that, "in addition to 'immutability,' the [BIA] requires that a particular social group have: '(1) social visibility, * * * (2) be defined with sufficient particularity, . . . and (3) not be defined exclusively by the fact that its members have been targeted for persecution.'" *Ibid.* (quoting *Scatambuli* v. *Holder*, 558 F.3d 53, 59 (1st Cir. 2009)).

The court of appeals then determined that "[petitioner's] claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group." App., *infra*, 4a (citing *Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (per curiam), and *S-E-G-*, 24 I. & N. Dec. at 586-588). The court also determined that "the proposed group is inchoate, as it is comprised of a potentially large and diffuse segment of El Salvadoran society." *Id.* at 4a-5a (citing *S-E-G-*, 24 I. & N. Dec. at 585). "To the extent that [petitioner] suggests that the [BIA's] definition of 'particular social group' should not control here," the court continued, "we defer to its reasonable interpretation of that term." *Id.* at 5a (citing *Scatambuli*, 558 F.3d at 59-60, and *Castillo-Arias*, 446 F.3d at 1197-1198).

REASONS FOR GRANTING THE PETITION

In the decision below, the Fourth Circuit concluded that petitioner was not entitled to asylum as a member of a "particular social group," on the ground that the proposed group failed to satisfy the requirements of "social visibility" and "particularity." In so concluding, the Fourth Circuit held that the BIA's recent adoption of those requirements was entitled to deference. That

holding deepens a circuit conflict concerning the validity of the social-visibility and particularity requirements—requirements that have no basis in the INA and that, if upheld, would dramatically narrow the class of aliens eligible for asylum. The definition of "particular social group" is a recurring issue of great importance to the administration of the immigration system, and this case constitutes an optimal vehicle in which to consider the issue. Certiorari should therefore be granted.

A. The Decision Below Deepens A Circuit Conflict Concerning The Definition Of "Particular Social Group"

1. In this case, the Fourth Circuit joined with seven other circuits in adopting the BIA's social-visibility and particularity requirements. The decisions of those circuits, however, conflict with two decisions of the Seventh Circuit, both written by Judge Posner, rejecting those requirements. This Court should intervene to resolve the resulting conflict.

a. In *Gatimi* v. *Holder*, 578 F.3d 611 (2009), the Seventh Circuit first refused to defer to the BIA's newly minted requirements. *Gatimi* involved an application for asylum by a defector from a Kenyan group that was "much given to violence." *Id.* at 613. After the defector was attacked for leaving the group, he fled to the United States, along with his relatives (who joined him in applying for asylum). *Id.* at 614.

The Seventh Circuit vacated the BIA's decision to uphold the applicants' removal and remanded for further proceedings. *Gatimi*, 578 F.3d at 618. As is relevant here, the court rejected the BIA's consideration of social visibility as "a criterion for determining [membership in a] 'particular social group.'" *Id.* at 615. The court acknowledged that "the [BIA's] definition of 'particular social group' is entitled to deference," *ibid.*, and that "our

sister circuits have generally approved 'social visibility' as a criterion" in the "particular social group" inquiry, *id.* at 616. But the court noted that "the [BIA] has been inconsistent rather than silent" in its consideration of social visibility, finding some groups to qualify without reference to that factor. *Id.* at 615-616. The court reasoned that the social-visibility requirement "makes no sense," because the BIA had not "attempted, in this or any other case, to explain the reasoning behind th[at] criterion." *Id.* at 615. And the court explained that the requirement would lead to perverse results because, "[i]f you are a member of a group that has been targeted for * * * persecution, you will take pains to avoid being socially visible." *Ibid.*

The Seventh Circuit has recently made clear that it rejects not only the social-visibility requirement, but also the accompanying particularity requirement. In *Ramos* v. *Holder*, No. 09-1932, ___ F.3d ___, 2009 WL 4800123 (Dec. 15, 2009), the Seventh Circuit considered a factually similar request for relief to the one at issue here, by a Salvadoran national who had renounced his membership in MS-13. *Id.* at *1. The court once again vacated the BIA's decision to uphold the applicant's removal and remanded for further proceedings. *Id.* at *5. The court began by reaffirming its rejection of the social-visibility requirement. *Id.* at *3. The court then proceeded to reject the particularity requirement, under which a proposed group could be "too unspecific and amorphous" to qualify as a "particular social group." *Id.* at *4. The court reasoned that, while "[t]here may be categories so ill-defined that they cannot be regarded as groups," such categories could be recognized as groups as long as they were openly targeted for persecution. *Ibid.* For example, the court explained, the "middle class" would not ordinarily qualify as a "particular social group," but, "if a

Stalin or a Pol Pot decide[d] to exterminate" its members, the Russian or Cambodian middle class would. *Ibid.*

b. By contrast, eight courts of appeals—including the Fourth Circuit in this case—have now embraced the BIA's social-visibility and particularity requirements. Six courts of appeals have held that, in order to establish the existence of a "particular social group," an applicant for asylum must satisfy both requirements in addition to the preexisting immutability requirement. See *Ucelo-Gomez*, 509 F.3d at 72-74 (holding, after discussing the social-visibility and particularity requirements, that "[t]he BIA's interpretation of the statutory phrase 'particular social group' * * * was * * * reasonable"); *Galindo-Torres* v. *Attorney General*, No. 08-3581, 2009 WL 3236057, at *2 (3d Cir. Oct. 9, 2009) (per curiam) (concluding that the BIA "reasonably rel[ied] on its prior precedent setting forth th[e] [social-visibility and particularity] requirements"); *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (noting that "the BIA has stated that the two key characteristics of a particular social group are particularity and social visibility"); *Davila-Mejia* v. *Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (determining that the applicants for asylum "failed to establish that [their shared characteristic] gave them sufficient social visibility to be perceived as a group by society" and that their proposed group was "too amorphous to adequately describe a social group"); *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 860 (9th Cir. 2009) (holding that the BIA's decision in *S-E-G-* was "a reasonable interpretation of the INA"); *Vasquez* v. *U.S. Attorney General*, No. 09-10309, 2009 WL 2868884, at *4-*5 (11th Cir. Sept. 8, 2009) (per curiam) (determining that the proposed group "lacks particularity" and "also fails the social visibility test").

For its part, the First Circuit has gone further, reasoning that an applicant for asylum must satisfy not only the three foregoing requirements but also the additional requirement that the group not be "defined *exclusively* by the fact that its members have been targeted for persecution." *Scatambuli*, 558 F.3d at 59 (citation omitted). The Fourth Circuit in this case quoted the First Circuit's standard with approval, thus suggesting that it too would embrace that additional requirement. See App., *infra*, 4a. Because the Fourth Circuit ultimately affirmed the denial of asylum based on its application of the social-visibility and particularity requirements, however, the critical point for present purposes is that it adopted those requirements—and, in so doing, deepened the conflict with the Seventh Circuit as to those requirements' validity.

c. Among the regional circuits, only the Fifth and Tenth Circuits have not taken a definite position on the applicability of the social-visibility and particularity requirements. The Fifth Circuit recently issued an opinion that signaled its approval of those requirements. See *Orellana-Monson* v. *Holder*, 332 Fed. Appx. 202, 203 (2009) (citing *S-E-G-*, 24 I. & N. Dec. at 584, and *E-A-G-*, 24 I. & N. Dec. at 594). After the applicants for asylum sought rehearing en banc based on the Seventh Circuit's opinion in *Gatimi*, however, the Fifth Circuit withdrew the opinion and granted panel rehearing, which is currently pending. See Order on Pet. for Reh'g En Banc at 1, *Orellana-Monson*, *supra* (Dec. 17, 2009). And the Tenth Circuit hinted that it would adopt the social-visibility and particularity requirements, but stopped short of expressly doing so. See *Nkwonta* v. *Mukasey*, 295 Fed. Appx. 279, 285-286 (2008) (citing *S-E-G-*, 24 I. & N. Dec. at 582). Because the overwhelming majority of the circuits have squarely addressed the issue, however,

this case presents a substantial circuit conflict that is ripe for the Court's review.

2. This case constitutes an ideal vehicle for the Court to resolve the circuit conflict concerning the definition of "particular social group," both because there are no facts in dispute here (in light of the immigration judge's finding that petitioner was credible, see App., *infra*, 21a) and because resolution of the conflict would plainly be outcome-dispositive. In affirming the denial of petitioner's asylum application, the Fourth Circuit unambiguously, if summarily, concluded that the BIA's adoption of the social-visibility and particularity requirements was entitled to deference—and that the proposed group failed both requirements. See *id.* at 4a-5a.[4]

Should this Court agree with the Seventh Circuit that the social-visibility and particularity requirements are improper, therefore, petitioner would be entitled to a remand to the BIA, because the BIA did not cite any other considerations in upholding the immigration judge's denial of asylum. See App., *infra*, 7a-8a. That is not surprising, because, under the BIA's preexisting immutability requirement, there would be no real ques-

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[4] Before the court of appeals, the government suggested that the BIA's decision rested only on the particularity and not the social-visibility requirement (though it urged the court of appeals to endorse the social-visibility requirement if it concluded otherwise). See, *e.g.*, Gov't C.A. Br. 21 n.3. For his part, petitioner noted that the BIA had cited *S-E-G-* and *E-A-G-*, both of which relied on the social-visibility requirement in rejecting proposed groups. See, *e.g.*, Pet. C.A. Br. 13-14, 18. The court of appeals evidently read the BIA's decision to rest on both requirements, because it addressed both (and it would have been improper for the court of appeals to consider a requirement that the BIA did not). See, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 185-187 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12, 16-18 (2002) (per curiam).

tion as to whether petitioner's proposed group would constitute a "particular social group"; indeed, the BIA has already suggested that Salvadoran youths who refuse to join MS-13 because of their opposition to its activities would satisfy that requirement. *S-E-G-*, 24 I. & N. Dec. at 584; see, *e.g.*, *Ramos-Lopez*, 563 F.3d at 860 (so reading *S-E-G-*); cf. *Ramos*, 2009 WL 4800123, at *2 (concluding that former Salvadoran gang members who refuse to *rejoin* their gangs would satisfy the immutability requirement). In any event, because neither the BIA nor the Fourth Circuit identified any other basis for refusing to recognize petitioner's membership in a "particular social group," this case is an optimal vehicle for resolution of the circuit conflict on that phrase's scope.[5]

B. The Court Of Appeals' Decision Is Erroneous

The Fourth Circuit erred in adopting the BIA's social-visibility and particularity requirements—and, in so doing, holding that the BIA's adoption of those requirements was entitled to deference.

1. To begin with, there is no basis in the text of Section 1101(a)(42)(A) for either of those requirements. That provision defines a "refugee" to include an alien who is unwilling or unable to return to his country of origin "because of persecution or a well-founded fear of

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[5] The immigration judge did suggest that, even assuming that petitioner's proposed group constituted a "particular social group," he had failed to show that he was persecuted "on account of" his membership in that group. App., *infra*, 25a. The BIA, however, did not rely on that ground in rejecting petitioner's claim on appeal, see *id.* at 7a-8a—and, for that reason, the government correctly conceded below that the only issue properly before the court of appeals was whether "[p]etitioner's proposed social group is cognizable." Gov't C.A. Br. 13 n.2.

persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). For purposes of interpreting the phrase "membership in a particular social group," the social-visibility and particularity requirements cannot be justified by resort to the interpretive canon of *ejusdem generis*, because neither social visibility nor particularity is a shared feature of the other bases for persecution identified in Section 1101(a)(42)(A)—many of which involve characteristics that can be either invisible (*e.g.*, religion) or shared by large and amorphous groups (*e.g.*, political opinion). Cf. *Acosta*, 19 I. & N. Dec. at 233 (relying on the canon of *ejusdem generis* as the basis for the immutability requirement).

Even assuming, however, that the BIA possesses some leeway to read requirements not justified by the canon of *ejusdem generis* into the definition of "particular social group," its adoption of the social-visibility and particularity requirements is not entitled to deference because those requirements simply "make[] no sense." *Gatimi*, 578 F.3d at 615. With regard to social visibility, such a requirement verges on the absurd, because, "[i]f you are a member of a group that has been targeted for * * * persecution, you will take pains to avoid being socially visible." *Ibid.* As a result, "[t]he only way * * * that [aliens] c[ould] qualify as members of a particular social group is by pinning a target to their backs with the legend" that they are group members. *Id.* at 616. It is questionable whether *any* group would satisfy such a requirement, with the possible exception of a readily distinguishable ethnic tribe or clan (whose members may in any event be eligible for asylum on other

grounds).[6] And with regard to particularity, it is hard to see why the size or shape of the group should matter, as long as the shared characteristic at issue is specifically identified and immutable (and the alien in question has a well-founded fear of persecution "on account of" membership in a group with that characteristic). See *Ramos*, 2009 WL 4800123, at *4. Because "[t]he [BIA] has never given a reasoned explanation" for the social-visibility and particularity requirements, they should be rejected. *Id.* at *3; see *Gatimi*, 578 F.3d at 615.

2. More generally, the BIA's newly minted social-visibility and particularity requirements "represent[] a sudden, unexplained departure from U.S. precedent and the dominant view of the international community." Fatma E. Marouf, *The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 Yale L. & Pol'y Rev. 47, 103 (2008) (Marouf).

As to domestic precedent, the BIA's decisions adopting those requirements cannot be reconciled with prior

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[6] To be sure, for purposes of establishing a well-founded fear of persecution *on account of* membership in a particular social group, it may be relevant whether "a feared persecutor could easily become aware of an applicant's protected beliefs or characteristics." *Eduard* v. *Ashcroft*, 379 F.3d 182, 192-193 (5th Cir. 2004) (internal quotation marks and citation omitted). But that is a far cry from a requirement that the shared characteristic already be known to society as a whole. See *Ramos*, 2009 WL 4800123, at *3 (noting that the government had argued that, under the social-visibility requirement, "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street"); *Gatimi*, 578 F.3d at 616 (noting that the government had "state[d] flatly" that "secrecy disqualifies a group from being deemed a particular social group").

decisions of the BIA and the courts under the preexisting *Acosta* immutability test, which have recognized "particular social groups" without reference to those requirements—most notably, women opposed to genital mutilation, see, *e.g.*, *Kasinga*, 21 I. & N. Dec. at 365-366; *Agbor* v. *Gonzales*, 487 F.3d 499, 502 (7th Cir. 2007), and homosexuals, see, *e.g.*, *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822-823 (B.I.A. 1990); *Nabulwala* v. *Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007). In adopting the social-visibility and particularity requirements in more recent decisions, the BIA neither abrogated those prior decisions nor made any meaningful effort to reconcile them. If those prior decisions remain valid, the BIA's adoption of its additional requirements is not entitled to deference, because "a court cannot pick one of the inconsistent lines [of agency decisionmaking] and defer to that one." *Gatimi*, 578 F.3d at 616 (citing cases). On the other hand, if those prior decisions no longer remain valid, the BIA's unelaborated change in position is not entitled to deference either. See, *e.g.*, *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

As to international law, in adopting the social-visibility and particularity requirements, the BIA relied on the 2002 guidelines of the United Nations High Commissioner for Refugees (UNHCR). See *S-E-G-*, 24 I. & N. Dec. at 586-587. In so doing, however, the BIA "misconstrued the[] meaning" of those guidelines—as the UNHCR has stated in recent amicus filings concerning the INA's definition of "particular social group."

E.g., UNHCR Br. at 5, *Orellana-Monson*, *supra* (May 7, 2009).[7]

The UNHCR guidelines establish a disjunctive, rather than conjunctive, test, under which a "particular social group" exists if the members of the group *either* "share a common characteristic other than their risk of being persecuted" *or* "are perceived as a group by society." UNHCR, *Guidelines on International Protection: 'Membership of a Particular Social Group' Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees* ¶ 11, at 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002).[8] Those guidelines thus suggest that, if the immutability requirement of *Acosta* is satisfied, the "particular social group" inquiry is at an end. It is only if that requirement is *not* satisfied that a court must engage in "further analysis * * * to determine whether the group is nonetheless perceived as a cognizable group in th[e] [relevant] society" (and seemingly without regard to whether the characteristic shared by the group is "visible" or not). *Id.* ¶ 13, at 4. And the UNHCR's guidelines contain no reference to any sort of freestanding "particularity" requirement; to the contrary, the UNHCR has taken the position that the particularity requirement "is confusing and does not provide helpful guidance." UNHCR

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[7] Notably, the government has essentially conceded that the BIA's approach is inconsistent with the UNHCR's. See Gov't Supp. Letter Br. at 10, *Orellana-Monson*, *supra* (Nov. 18, 2009).

[8] See *Secretary of State for the Home Dep't* v. *K* [2006] UKHL 46, ¶ 16 (opinion of Lord Bingham) (noting the UNHCR's view that "the criteria * * * should be treated as alternatives, providing for recognition of a particular social group where either criterion is met and not requiring that both be met").

Br. at 8, *Orellana-Monson*, *supra*. Because "one of Congress' primary purposes [in enacting the Refugee Act] was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees," *Cardoza-Fonseca*, 480 U.S. at 436-437, and because the UNHCR guidelines interpret that protocol, those guidelines are a "useful * * * aid" in interpreting provisions of the Refugee Act such as Section 1101(a)(42)(A). *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).[9]

In sum, there is no basis in law or logic for the BIA's novel social-visibility and particularity requirements, and those requirements narrow eligibility for asylum beyond what Congress could conceivably have intended. This Court should grant review and reverse the Fourth Circuit's erroneous decision adopting those requirements.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

The question presented in this case—*i.e.*, whether a group must be "socially visible" and "particularized" to qualify as a "particular social group" for purposes of Section 1101(a)(42)(A)—is one of obvious importance to the administration of the immigration system. That question therefore warrants this Court's review.

1. As the government has noted in prior filings in this Court, "[a]sylum applications * * * play a significant role in the immigration work and workload of the Justice Department and the Department of Homeland

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[9] Consistent with the UNHCR guidelines, a number of other countries have applied the immutability requirement in determining whether a group qualifies as a "particular social group," with some relying on the BIA's decision in *Acosta* in doing so. See Marouf, *supra*, at 51-57.

Security." Pet. at 22, *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (No. 05-552). In Fiscal Year 2008, over 47,000 claims for asylum were adjudicated in removal proceedings alone (a figure that does not include claims by aliens not in removal proceedings, which are processed by the Secretary of Homeland Security). See Executive Office for Immigration Review, Dep't of Justice, *Immigration Courts—2008 Asylum Statistics* (Mar. 2009) <www.justice.gov/eoir/efoia/FY08AsyStats.pdf>. Every year, moreover, thousands of those claims culminate in petitions for review in the federal courts of appeals. See Pet. at 21, *Thomas*, *supra* (noting that, in Fiscal Year 2005, 4,460 petitions for review were filed in asylum cases).

As a result, courts are frequently confronted with questions concerning the standards of eligibility for asylum—and the decisions of those courts, in turn, "can have a significant impact on immigration policy and the administration of the immigration laws." Pet. at 23, *Thomas*, *supra*. There can be no doubt, moreover, that the specific question presented in this case is a frequently recurring one: as noted above, all but two of the regional circuits have definitively addressed the question presented *since 2007*, with most of those circuits doing so in the last eighteen months (in the wake of the BIA's decision in *S-E-G-*, which made clear that BIA treated social visibility and particularity as discrete requirements for membership in a particular social group). See pp. 10-14, *supra*.

2. The BIA's recent adoption of the social-visibility and particularity requirements has received considerable attention from commentators—and has caused widespread consternation in the immigration bar. See, *e.g.*, Danielle L.C. Beach, *Battlefield of Gendercide: Forced Marriages and Gender-Based Grounds for Asylum and Related Relief*, Immigr. Briefings, Dec. 2009, at 1, 9 (con-

tending that, "[s]ince *Acosta*, the Board has offered a complex and at times confusing and contradictory definition of what constitutes a particular social group"); Marouf, *supra*, at 51 (asserting that the BIA's new approach "destroys *Acosta*'s principled framework, represents an abdication of U.S. obligations under the 1967 Protocol, cannot be applied in a consistent way, and ignores the complex relationship between visibility and power"); Joe Palazzolo, *Fight Over New Asylum Barrier: Lawyers Ask Holder For A Review*, Legal Times, Mar. 2, 2009, at 1 (noting that the BIA's decision in *S-E-G-* "cast new clouds on an increasingly murky section of asylum law"; that "[i]mmigration experts say the ruling is likely to create confusion among the nation's 214 immigration judges"; and that critics "say the board's decision guts a 24-year-old precedent [*Acosta*]"). In addition, many of the cases in which the BIA has sought to apply the social-visibility and particularity requirements arise in factual contexts similar to, if not indistinguishable from, the context here. Indeed, *S-E-G-* itself involved a materially identical proposed group: *viz.*, Salvadoran youths who refused to join gangs because of their opposition to the gangs' violent activities. See 24 I. & N. Dec. at 581.

3. In the nearly thirty years since the enactment of the Refugee Act, this Court has never directly addressed the definition of "particular social group"—an issue with which, as then-Judge Alito noted almost two decades ago, "[lower] courts * * * have struggled." *Fatin*, 12 F.3d at 1238; cf. *Thomas*, 547 U.S. at 186-187 (summarily reversing, on procedural grounds, a Ninth Circuit decision on the definition of "particular social group"). There is an overwhelming need for a uniform definition of that phrase, because the fate of an applicant for asylum should not turn on the location in which the application is adjudicated. Just as importantly, there is no valid justi-

fication for the BIA's newly minted, and radically more restrictive, definition, which casts doubt on the validity of earlier decisions granting protection to groups such as women opposed to genital mutilation. This Court should grant review in order to resolve the circuit conflict on the validity of the BIA's current definition. And it should reject that definition and thereby restore the previously settled understanding of a vitally important provision of the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2323

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Submitted August 21, 2009
Decided October 13, 2009

Before WILKINSON, KING, and GREGORY, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Balmoris Alexander Contreras-Martinez, a native and citizen of El Salvador, petitions for review of an order of the Board of Immigration Appeals ("Board") dismissing his appeal from the immigration judge's order denying his applications for asylum, withholding of removal and withholding under the Convention Against Torture ("CAT"). We deny the petition for review.

The INA authorizes the Attorney General to confer asylum on any refugee. 8 U.S.C. § 1158(a) (2006). It defines a refugee as a person unwilling or unable to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (2006). "Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds. . . ." *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (quotation marks and citations omitted).

An alien "bear[s] the burden of proving eligibility for asylum," *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006) ; *see* 8 C.F.R. § 1208.13(a) (2009), and can establish refugee status based on past persecution in his native country on account of a protected ground. 8 C.F.R. § 1208.13(b)(1). Without regard to past persecution, an alien can establish a well-founded fear of persecution on a protected ground. *Ngarurih v. Ashcroft*, 371 F.3d 182, 187 (4th Cir. 2004).

The well-founded fear standard contains both a subjective and an objective component. The objective component requires a showing of specific, concrete facts that would lead a reasonable person in like circumstances to

fear persecution. *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 353 (4th Cir. 2006). "The subjective component can be met through the presentation of candid, credible, and sincere testimony demonstrating a genuine fear of persecution . . . . [It] must have some basis in the reality of the circumstances and be validated with specific, concrete facts . . . and it cannot be mere irrational apprehension." *Li*, 405 F.3d at 176 (quotation marks, citations, and alteration omitted).

A determination regarding eligibility for asylum or withholding of removal is affirmed if supported by substantial evidence on the record considered as a whole. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Administrative findings of fact, including findings on credibility, are conclusive unless any reasonable adjudicator would be compelled to decide to the contrary. 8 U.S.C. § 1252(b)(4)(B) (2006). Legal issues are reviewed de novo, "affording appropriate deference to the [Board's] interpretation of the INA and any attendant regulations." *Lin v. Mukasey*, 517 F.3d 685, 691-92 (4th Cir. 2008). This court will reverse the Board only if "the evidence . . . presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias-Zacarias*, 502 U.S. at 483-84; *see Rusu v. INS*, 296 F.3d 316, 325 n.14 (4th Cir. 2002).

We find no error in the Board's denial of Contreras-Martinez' claims for asylum and withholding of removal. His proposed social group of adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities is too broad and ill-defined to qualify as a "particular social group" within the meaning of the INA. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3).

The Board has defined "persecution on account of membership in a particular social group" within the meaning of the INA to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic[,] . . . one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Further, as detailed in *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) and affirmed in *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-76 (B.I.A. 2007), in addition to "immutability," the Board requires that a particular social group have: "(1) social visibility, meaning that members possess characteristics . . . visible and recognizable by others in the native country, . . . (2) be defined with sufficient particularity to avoid indeterminacy, . . . and (3) not be defined exclusively by the fact that its members have been targeted for persecution[.]" *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (quotation marks, citations, and alterations omitted).

Contreras-Martinez' claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group. *See Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) ("[M]embership in a purported social group requires a certain level of 'social visibility.'"); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586-88 (B.I.A. 2008) (concluding that Salvadoran youths who resist gang recruitment are not a cognizable social group because they do not share recognizable and discrete attributes). Additionally, the proposed group is inchoate, as it is comprised of a potentially large and diffuse seg-

ment of El Salvadoran society. *See Matter of S-E-G-*, 24 I. & N. Dec. at 585. To the extent that Contreras-Martinez suggests that the Board's definition of "particular social group" should not control here, we defer to its reasonable interpretation of that term. *See Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197-98 (11th Cir. 2006); *see also Scatambuli*, 558 F.3d at 59-60 (upholding "social visibility" as a criteria for a particular social group).

We further find that substantial evidence supports the Board's finding that Contreras-Martinez was not eligible for relief under the CAT. Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

A98-115-469 – Baltimore, MD

IN RE BALMORIS ALEXANDER CONTRERAS-MARTINEZ

IN REMOVAL PROCEEDINGS
APPEAL

Oct. 29, 2008

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER

PER CURIAM. The respondent appeals from the decision of the Immigration Judge to deny his applications for asylum, withholding of removal, and protection under the Convention Against Torture. The appeal is dismissed.

On appeal, the respondent argues that the MS-13 gangs in El Salvador persecuted him on account of his membership in a particular social group, namely "adolescents in El Salvador who refuse to join gangs of that country because of their opposition to the gangs' violent criminal activities." The respondent argues that members of this group share a common immutable characteristic that is fundamental to their identities. The respondent argues that he demonstrated that the government of El Salvador has acquiesced to gang violence against its citizens and contends that he is therefore eligible for protection under the Convention Against Torture.

We have defined a "social group" to be "a group of persons all of whom share a common, immutable characteristic." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (holding that a Salvadoran taxi cooperative did not constitute a particular social group). The respondent's proposed social group of "adolescents in El Salvador who refuse to join gangs of that country because of their opposition to the gangs' violent criminal activities" is too broad and ill defined to constitute a discrete particular social group within the meaning of the Immigration and Nationality Act. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and have rejected and who rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities nor the family of member of such Salvadoran youth constitute a "particular social group"). Therefore, we adopt and affirm the decision of the Immigration Judge finding that the respondent's proposed social group does not constitute a particular social group within the meaning of the Act. *Id.; INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004);

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (finding that "persons resistant to gang membership" does not constitute a particular social group).

We do not find sufficient evidence to establish that the government of El Salvador has acquiesced to gang violence against its citizens at present or in the future. We note that the United States Court of Appeals for the Eighth Circuit squarely addressed this question and found that while the government of El Salvador may have a problem controlling gang activity of which it is aware, this is not sufficient to find acquiescence to torture by third parties. *See Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005). 8 C.F.R. § 1208.18(a)(1). The United States Court of Appeals for the Fourth Circuit affirmed this Board's conclusion that a Guatemalan alien failed to establish eligibility for relief under the Convention Against Torture because he had not shown that the government of Guatemala acquiesced in the torturous activities of the Mara 18 criminal gang. *Lopez-Soto v. Ashcroft*, *supra*, at 240. Accordingly, the respondent's appeal is dismissed.

Frederick D. Hess
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

A98-115-469

IN THE MATTER OF CONTRERAS-MARTINEZ,
BALMORIS ALEXANDER, RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGE: **Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i),** as amended, in that Respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General

APPLICATIONS: Asylum, pursuant to **INA § 208;** Withholding of Removal pursuant to **INA § 241(b)(3);** and Withholding of Removal pursuant to **Article 3 of the United Nations Convention Against Torture and Other Forms**

of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a 20-year-old male, native and citizen of El Salvador. He arrived in the United States at or near Brownsville, Texas on or about July 15, 2004 and was intercepted by immigration officials. Respondent was placed in proceedings through the issuance of a Notice to Appear ("NTA"), dated July 15, 2004. The NTA alleges that: (1) Respondent is not a citizen or national of the United States; (2) Respondent is a native of El Salvador and a citizen of El Salvador; (3) Respondent arrived in the United States at or near Brownsville, Texas, on or about July 15, 2004; and (4) Respondent was not then admitted or paroled after inspection by an Immigration Officer. Based upon these allegations, the NTA charges Respondent with removability pursuant to **INA § 212(a)(6)(A)(i)**.

At a master calendar hearing held on March 7, 2005, Respondent admitted the factual allegations contained in the NTA and conceded the charge of removability. Thus, the Court sustained the charge of removability under **INA § 212(a)(6)(A)(i)**. At the request of DHS counsel, El Salvador was designated by the Court as the country of removal. On May 2, 2005, Respondent filed his application for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture**. A merits hearing was held on October 28, 2005, wherein Respondent testified on his own behalf and offered the witness

testimony Dr. Negro. Following the merits hearing, the Court reserved its decision to review the testimony and evidence presented, and to allow the Government to complete its background check. The background check is complete, and the Court has now had an opportunity to consider, in full, the contents of Respondent's application as well as the contents of all documents that were admitted into evidence. For the following reasons, all applications for relief will be denied.

II. Evidence Presented

A. Testimonial Evidence

Testimony of Respondent[1]

Respondent testified that he reluctantly agreed to attend the initiation of his friend Mauricio into a gang because he always liked to accompany Mauricio and did not realize what would happen. Although Respondent had heard about Mara Salvatrucha (or MS-13) at the time, he was not clear about what the group signified. Initially, Respondent told Mauricio that he did not want to attend the initiation because of his Christian and moral beliefs — i.e. that he was opposed to the killing, robbing, and raping that the gang was known for. This did not stop Respondent's attendance because he looked up to Mauricio as an older brother — Respondent loved, admired, and appreciated him. Even though Respondent was fearful of MS-13 at the time, his fear escalated after Mauricio

[1] Respondent stipulated to the detailed facts contained in his affidavit. Therefore, testimony began with cross-examination, and Respondent was given the opportunity for re-direct examination if necessary.

joined. Respondent was not concerned that members of MS-13 would contact him because the initiation was for Mauricio and because Respondent did not stay for the entire initiation. No one attempted to stop Respondent from leaving the initiation. He indicated that the MS-13 gang allowed him to leave because they were aware of his values at the time and only attempted to force him to join the gang after Mauricio did.

Respondent stated that he attempted to avoid gang members, but they continued to beat him and call him derogatory names. Other children in Respondent's age group also had problems with the gang. He said that if he were forced to return, he would no longer be a student but because the gangs are everywhere, it would impossible to avoid their recruitment efforts. Further, Respondent testified that members of the gang knew him, and therefore, it would be impossible to relocate within El Salvador.

Lastly, Respondent testified that his family — with the exception of his alcoholic father — is in the U.S. His two brothers, three sisters, and his mother live here.

There was no re-direct examination.

Testimony of Dr. Paulo J. Negro[2]

Dr. Negro testified that, during the course of his sessions with Respondent, there did not appear to be any malingering. He said that it would have been difficult for Respondent to reproduce a consistent emotional response if he were not truthful. In fact, Respondent's re-

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[2] Respondent stipulated to the facts contained in the witness's report. Therefore, testimony began with cross-examination, and Respondent was given the opportunity for re-direct examination if necessary.

sponse was somewhat restricted or limited. Dr. Negro indicated that Respondent used to have intrusive memories but now exhibits more avoidance characteristics.

Dr. Negro initially saw Respondent in September for an hour-long interview and again in October to see how Respondent was doing and to make sure there had been no changes before the hearing. Dr. Negro stated that because of Respondent's restricted emotion, he also had a second session to see if he could "get something else from him." Dr. Negro testified that the normal interview length required to make a diagnosis of post traumatic stress disorder can be less than an hour and that it depends on the type of symptoms exhibited.

B. Documentary Evidence:

The following exhibits were received and admitted into evidence:

Exhibit 1:

- Notice to Appear, dated July 15, 2004

Exhibit 2:

- Form I-589, Application for Asylum and for Withholding of Removal, and supporting documentation:
  - A. Affidavit of Respondent
  - B. English translation of Respondent's affidavit
  - C. Report and resume of Luis Rodriguez
  - D. Affidavit of Alex Sanchez
  - E. U.S. Department of State 2004 Country Report on the Human Rights Practices in El Salvador

F. Birth Certificate of Respondent
G. English translation of Respondent's birth certificate
H. Report of Dr. Mauricio Arturo Erazo Anaya
I. English translation of Dr. Anaya's report
J. Report and curriculum vitae of Dr. Paulo J. Negro
K. Affidavit of Jose Contreras
L. Certificate of Attendance, Miguel de Unamuno Institute
M. English translation of Certificate of Attendance
N. Copy of one page of Respondent's Salvadoran passport
O. English translation of passport
P. U.S. Department of Justice December 10, 1998 Memorandum entitled *Guidelines for Children's Asylum Claims*
Q. U.S. Department of State March 17, 2005 Consular Information Sheet on El Salvador
R. September 17, 2004 Washington Post article entitled *Central America's Gang Crisis*
S. September 26, 2004 New York Times article entitled *Latino gangs Confound the Law*
T. July 20, 2005 El Diario de Hoy article entitled *Asesinan a un estudiante a balazos en San Martin*
U. English translation of Subexhibit T

V. August 2, 2005 Diario El Mundo article entitled *Se dispara ola de homicidios en El Salvador, un promedio de 12 diarios*

W. English translation of Subexhibit V

X. June 7, 2005 New York Times article entitled *How the Street Gangs Took Central America*

Y. *Country of Origin Research*, Canada Immigration & Refugee Board (November 28, 2002)

Z. November 8, 2004 Ameriquests article entitled *Youth, Gangs, and Corruption in Honduras: Social Group Membership and Political Opinion as Grounds for Political Asylum in the United States*

AA. Decision of the Immigration Judge, **In re D-V-**, Immigration Court, San Antonio, TX (September 9, 2004)

BB. Decision of the Immigration Judge, **Matter of Lopez-Soto**, Immigration Court, Arlington, VA (April 19, 2001)

III. Statement of Law and Findings of the Court

The Court has considered the entire record carefully. All evidence and testimony has been considered, even if not specifically addressed further below. Respondents' applications for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture** are denied based on the following findings.

A. Applicable Standards

INA § 208(a) provides that an alien may be granted asylum in the exercise of discretion if he or she qualifies as a refugee within the meaning of INA § 101(a)(42)(A). An applicant for asylum "bears the burden of establishing that he or she meets the 'refugee' definition of INA § 101(a)(42)(A)," which defines a refugee in part as an alien who is unable or unwilling to return to his or her home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); see also 8 C.F.R. § 1208.13(a); INA § 208(a). The alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under INA § 208. See 8 C.F.R. § 1208.13(a); see also Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987). The alien's fear of persecution must be country-wide. Acosta, 19 I&N Dec. at 235; see also Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). Additionally, the alien must establish that he or she is unable or unwilling to avail himself or herself of the protection of the alien's country of nationality or last habitual residence. INA § 101(a)(42)(A). Finally, the alien must demonstrate that he or she is eligible for asylum as a matter of discretion. See INA § 208(b)(1); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

In applications for asylum, withholding of removal, and withholding of removal under Article 3 of the Convention Against Torture, the Court generally makes a threshold determination of the alien's credibility. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); see also

Matter of Pula, 19 I&N Dec. 467 (BIA 1987); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988). An applicant's own testimony is sufficient to meet his or her burden of proving the asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. See Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 1208.13(a). An applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of the asylum claim where credibility is not specifically called into question. See Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998). In assessing the application for asylum, inconsistent accounts create doubts regarding the alien's credibility. See Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1957). To be sure, in some cases, an applicant may be found to be credible even if he or she has trouble remembering specific facts. See e.g., Matter of B-, 21 I&N Dec. 66 (BIA 1995) (finding that an alien who has fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception). However, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable or implausible. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); see also Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998) (holding that a credibility finding should be accorded a high degree of deference when the discrepancies described by the Immigration Judge are actually present, the discrepancies provide specific reasons to conclude that the alien provided incredible testimony and "a convincing explanation for the discrepancies and omissions has not been supplied by the alien" although he had the opportunity to do so). Furthermore, the presentation by an asylum applicant of an identification document that is

found to be false not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of a sufficient explanation, also indicates an overall lack of credibility regarding the entire claims. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998).

An applicant must also prove that there is a reasonable possibility that he or she might suffer persecution if returned to his or her native country. See 8 C.F.R. § 1208.13(b)(2)(i)(B). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See Cardoza-Fonseca, 480 U.S. at 421. A respondent must show some degree of likelihood that he or she may be persecuted. Matter of Acosta, 19 I&N at 226; see also Cardoza-Fonseca, 480 U.S. at 431. The BIA has interpreted "persecution" to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. Matter of Acosta, 19 I&N at 233. Cf. Klawitter v. INS, 970 F.2d 149, 152 (6th Cir. 1992) (distinguishing between mere harassment and persecution); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996) (discussing the level of harm necessary to constitute persecution). Persecution must also be more than mere harassment. See Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998). The persecution must also be on account of one of the protected grounds specified in the "refugee" definition. In mixed motive cases, any asylum application is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecu-

tion, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed political ground. See In re S-P-, 21 I&N Dec. 486 (BIA 1996); see also I.N.S. v. Elias-Zacarias, 112 S.Ct. 812 (1992)(finding that persecution on *account of* political opinion is not established by the fact that the coercing guerrillas had "political" motives; in order to satisfy § 101(a)(42), the persecution must be on account of the *victim's* political opinion, not the persecutor's).

An applicant for asylum demonstrates a well-founded fear if he or she presents specific facts establishing that he or she has actually been the victim of persecution. Cardoza-Fonseca, 480 U.S. at 421; Matter of Mogharrabi, 19 I&N Dec. at 439. Evidence of past persecution raises a rebuttable presumption that an alien has reason to fear future persecution. Matter of Chen, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R. § 1208.13(b)(1)(i). This presumption may be rebutted by proving by a preponderance of the evidence that conditions in the country have changed to such a degree that there is little likelihood of present persecution. Matter of Chen, 20 I&N Dec. at 18; see also Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004).

An applicant for asylum and withholding must demonstrate that his fear of being targeted by gangs would constitute persecution "on account of" a recognized ground. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004).

Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country rather than the right to remain in the U.S. See INS v. Aguirre-Aguirre, 526 U.S. 415 (1999). To establish eligibility for withholding of removal, a respondent

must show that there is a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). Such a showing requires that the respondents establish that it is more likely than not that they would be subject to persecution if returned to the country from which they seek withholding of removal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). Thus, the standard for withholding of removal is more stringent than the standard for asylum. Stevic at 429-430.

The applicant for withholding of removal under the **Convention Against Torture** bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. § 1208.16(c)(2). "Torture" is defined in the treaty and at 8 C.F.R. § 1208.18(a)(1). Additionally, the torture must come at the hands of the government of El Salvador. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). In assessing whether the applicant has satisfied his or her burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant, or mass violations of human rights within the country of removal; and other relevant information of conditions in the country of removal. See 8 C.F.R. § 1208.16(c)(3). Because a claim under the **Convention Against Torture** is analytically distinct from an asylum claim, the Court may not deny an alien's **Convention Against Torture** claim solely on the basis of an adverse credibility determination.

Camara v. Ashcroft, 378 F.3d 361, 372 (4th Cir. 2004). However, the alien must present other evidence in support of his or her claim. Id.

The inability of a government to control criminal gangs does not constitute the "acquiescence" contemplated in Article III of the Convention Against Torture. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004).

B. Analysis

In the matter *sub judice*, the Court finds that Respondent is credible. His overall testimony was candid, detailed, and for the most part, consistent. The harm that Respondent describes in his affidavit and in his sworn testimony is plausible given the historical information on country conditions which reflects that persecution and gang violence in El Salvador and other Latin American countries is rampant. After considering all relevant factors, along with the testimony and evidence of record, the Court resolves credibility in Respondent's favor. See INA § 208(b)(1)(B)(iii).

Credible testimony, however, can only satisfy an asylum applicant's burden of proof if it is persuasive and if it refers to sufficient facts to demonstrate that the applicant is a refugee. INA § 208(b)(1)(B)(ii). As the Court finds Respondent's testimony to be persuasive, the only question remaining is whether he has demonstrated that he is a refugee under the INA — *i.e.* that he is an alien who is unable or unwilling to return to his home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion as defined in the INA. See INA § 101(a)(42)(A).

Respondent's fear of persecution is based on his membership in a particular social group, which he defines as "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities." See **Respondent's Memorandum of Law and Facts in Support of Application for Asylum, Withholding of Removal, and/or Withholding Under the Convention Against Torture**. Therefore, the question of whether he meets the definition of a refugee under the INA hinges on whether he has a well-founded fear of persecution on account of a protected ground.

Respondent described a continual pattern of harassing behavior beginning at an early age. And while these experiences were surely unpleasant, they do not, standing alone, rise to the level of persecution. However, the two incidents that Respondent described in detail, coupled with the continual harassment, do lead this Court to find that Respondent has been persecuted by the gangs in El Salvador. In September 2003, while walking home from school, Respondent was approached by several gang members and threatened with death. During a second incident, in the spring of 2004, Respondent was viciously beaten to the point of unconsciousness. Considering the serious nature of these events and the escalation in violence that was displayed toward Respondent, the Court readily concludes that Respondent has been the victim of persecution in the past.

However, merely establishing past persecution is not sufficient. Respondent must also demonstrate that this past persecution was inflicted *on account of* his claimed membership in a particular social group. 8 **U.S.C. § 1101(a)(42)(A)**. To make such a showing, he must (1) specify the particular social group, (2) show that he is a

member of that group, and (3) show that he has a well-founded fear of persecution based on his membership in that group. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004). This Court recognizes that Respondent's membership need only be *a* motive for the persecution. See Matter of S-P-, 21 I&N Dec. 486 (BIA 1996). However, such motivation must be shown by a preponderance of the evidence. 8 C.F.R. § 208.13.

Membership in a particular social group must be defined by a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Persecution on account of membership in a particular social group has been interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is so fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to [his] identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this

manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." **Matter of Acosta, 19 I&N Dec. 211 (B1A 1985).**

As noted above, Respondent defines his social group as "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities." The Court, however, finds that this claimed social group is too tenuous to qualify as such under the INA. Accepting Respondent's designation would create a situation wherein virtually every non-criminal adolescent in El Salvador that was targeted by gang members would qualify for asylum in the United States. The Court declines to extend the definition of 'particular social group' to such extremes. Nonetheless, assuming *arguendo* that adolescents as Respondent describes them can constitute a particular social group under the INA, Respondent has failed to show that he was persecuted *on account of* his alleged membership in this group.

Respondent distinguishes his persecution from other accounts of forced recruitment by stating that he was persecuted because of his opposition to the gangs' violent and criminal activities, not simply because he refused to join. The Court, however, finds this to be a distinction without a difference. Further, there is no independent evidence of record to support Respondent's assertion that he was persecuted for something more than his simple refusal to join a gang.

Indeed, the persecutors did not mention Respondent's moral beliefs during either of the more serious attacks. Further, the report of Luis Rodriquez suggests that the gangs of Central America do persecute those

who refuse to join, but it does not say that the gangs do so for any reason other than the refusal itself. See **Group Exhibit 2, Subexhibit C.** The affidavit of Alex Sanchez indicates that "[a]lmost all young people in El Salvador are at risk of being targeted for recruitment by the gangs, but those who already have some ties with the gang are particularly expected to join. If an individual has been friends with members of a gang, they will think he is taking advantage of their protection and loyalty or feel disrespected if he does not eventually join the gang." See **Group Exhibit 2, Subexhibit D.** This is why Mauricio (and his gang) targeted Respondent — not because they were attempting to overcome Respondent's aversion to criminal activity.

Without more, this Court cannot find that there is any nexus between Respondent's persecution and his membership in the alleged social group. The situation at hand in Central America is distressing, and Respondent's case is, indeed, a sympathetic one. However, the Court is bound by the law. Because Respondent has failed to demonstrate a sufficient nexus, it cannot be said that the past persecution he faced was on account of a protected ground: For the same reason, the Court finds he is unable to establish that future persecution on account of a protected ground is likely. His applications for asylum pursuant to **INA § 208** and withholding of removal pursuant to **INA § 241(b)(3)** are, therefore, denied.

As a prerequisite to relief under the **Convention Against Torture**, an applicant must show that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons that fear entities that a government is unable to control. **Lopez-Soto v. Ashcroft**, 383 F.3d 228 (4th Cir.

2004); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). This standard requires an applicant to do more than show that officials are aware of the activity but are powerless to stop it: Id. Because Respondent fears torture at the hands of criminal gangs rather than a public official or other person acting in an official capacity, his claim under the **Convention Against Torture** fails. Accordingly, such relief is denied.

IV. Conclusion

The Court has found that Respondent has failed to meet his burden of proof with regard to his applications for asylum, withholding of removal under **INA § 241(6)(3)**, and withholding under the **Convention Against Torture**. Although Respondent's claim is credible, he has failed to show that persecution or torture would result if removed to El Salvador. Therefore, the applications for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture** are denied. An appropriate order is attached.

ORDER

It is this 4th day of October 2006, by the United States Immigration Court, sitting at Baltimore, Maryland,

ORDERED:

I. that the application for asylum pursuant to **INA § 208** is **DENIED;**

II. that the application for withholding of removal pursuant to **INA § 241(b)(3)** is **DENIED;**

III. that the applications for withholding of removal, pursuant to **Article 3 of the Convention Against Torture** is **DENIED;** and

IV. that Respondent be **REMOVED** to El Salvador as charged.

Lisa Darnell
United States Immigration Judge
Baltimore, Maryland

OCT 4 2006

No. 09-830

In the Supreme Court of the United States

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities" constitute a "particular social group" under the asylum provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

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In the Supreme Court of the United States

No. 09-830

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported. The decisions of the Board of Immigration Appeals (Pet. App. 6a-8a) and the immigration judge (Pet. App. 9a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2009. The petition for a writ of certiorari was filed on January 11, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA or Act), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security (Secretary) or the Attorney Gen-

eral "may" grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A); see 8 C.F.R. 208.13(a), 1208.13(a) ("The burden of proof is on the applicant for asylum to establish that he or she is a refugee."). The INA defines "refugee" as an alien "who is unable or unwilling to" return to his country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A).

The INA does not further define "particular social group." In a precedential decision issued in 1985, the Board of Immigration Appeals (BIA or Board) described that phrase as referring to a "group of persons all of whom share a common, immutable characteristic" that "the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The Board suggested that the shared characteristic "might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership." *Ibid.* The Board emphasized, however, that whether a proposed group qualifies "remains to be determined on a case-by-case basis." *Ibid.*

Between 1985 and 1997, the Board's decisions identified four "particular social groups": persons identified as homosexuals by the Cuban government;[1] members of

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[1] *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 821-823 (B.I.A. 1990).

the Marehan subclan of the Darood clan in Somalia;[2] "young women of the Tchamba-Kunsuntu Tribe [of northern Togo] who have not had [female genital mutilation (FGM)], as practiced by that tribe, and who oppose the practice";[3] and Filipinos of mixed Filipino and Chinese ancestry.[4] The BIA also suggested that, "in appropriate circumstances," an alien could establish a valid asylum claim based on persecution as a "former member of the national police" of El Salvador.[5] Several of these decisions relied not only on an immutable/fundamental group characteristic, but also on the recognizability of the group in the pertinent society. See *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997) (relying on evidence that a percentage of the population had "an identifiable Chinese background"); *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996) (reasoning that "clan membership is a highly recognizable, immutable characteristic" and that clan members were "identifiable as a group based upon linguistic commonalities").

Between 2006 and 2008, in response to the evolving nature of claims presented by aliens seeking asylum and developing case law in the courts of appeals, the BIA issued four precedential decisions that were designed to provide "greater specificity" in defining the phrase "particular social group." *In re S-E-G-*, 24 I. & N. Dec. 579, 582 (B.I.A. 2008).[6] Those decisions restated the

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[2] *In re H-*, 21 I. & N. Dec. 337, 342-343 (B.I.A. 1996).

[3] *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

[4] *In re V-T-S-*, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

[5] *In re Fuentes*, 19 I. & N. Dec. 658, 662-663 (B.I.A. 1988).

[6] On December 7, 2000, the former Immigration and Naturalization Service issued a proposed rule that would have provided guidance regarding the definitions of "persecution" and "membership in a

immutable/fundamental characteristic requirement. See *In re A-M-E-*, 24 I. & N. Dec. 69, 73-74 (B.I.A.), aff'd *sub nom. Ucelo-Gomez* v. *Mukasey*, 509 F.3d 70 (2d Cir. 2007); *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A.), aff'd *sub nom. Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). They also "reaffirmed" (*In re A-M-E-*, 24 I. & N. Dec. at 74) that, consistent with the Board's previous decisions, a qualifying social group must possess a recognized level of "social visibility," which describes "the extent to which members of a society perceive those with the characteristic in question as a member of a social group." *In re E-A-G-*, 24 I. & N. Dec. 591, 594 (B.I.A. 2008). The Board explained that this approach was consistent with its prior decisions, which had considered the "recognizability" of a proposed group. See *In re C-A-*, 23 I. & N. Dec. at 959. The Board also referred to guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), which discuss the "visibility" of a proposed group and whether the group is perceived as such by the pertinent society. *Id.* at 956, 960.

The Board's recent decisions also stated that the analysis of "particular social group" claims involves consideration of whether the group in question is defined with sufficient "particularity." *In re A-M-E-*, 24 I. & N. Dec. at 74, 76; *In re C-A-*, 23 I. & N. Dec. at 957. The proposed group cannot be too "amorphous" or "indeterminate" or be defined by a characteristic "too subjective, inchoate, and variable to provide the sole basis for membership." *In re A-M-E-*, 24 I. & N. Dec. at 76; see *ibid.* (stating that "[t]he terms 'wealthy' and 'affluent' stand-

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particular social group." 65 Fed. Reg. 76,588. That proposed rule has been neither withdrawn nor finalized during the subsequent nine years.

ing alone are too amorphous to provide an adequate benchmark for determining group membership"). The Board also stated that it will consider whether the proposed group "share[s] a common characteristic other than their risk of being persecuted," or instead is "defined *exclusively* by the fact that [the group] is targeted for persecution." *In re C-A-*, 23 I. & N. Dec. at 956, 960; see *id.* at 957 (finding group of "noncriminal informants" "too loosely defined to meet the requirement of particularity").

In the two most recent of these precedential decisions, the Board applied the above considerations in addressing, and rejecting, claims of asylum based on resistance to gang recruitment. In *In re S-E-G-*, the Board rejected a proposed social group of "Salvadoran youth who have been subjected to recruitment efforts by [the Mara Salvatrucha gang] and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities." 24 I. & N. Dec. at 581, 588. And in *In re E-A-G-*, the Board rejected a proposed social group of young "persons resistant to gang membership" in Honduras. 24 I. & N. Dec. at 593.

2. Petitioner is a native and citizen of El Salvador who entered the United States without authorization in 2004. Pet. App. 10a. He was apprehended by immigration officials, who commenced removal proceedings. *Ibid.* Petitioner admitted the factual allegations against him and conceded removability (*ibid.*), but sought asylum based on his membership in a "particular social group" consisting of "adolescents in El Salvador who refuse to join the gangs of that country because of their

opposition to the gangs' violent and criminal activities." *Id.* at 22a.[7]

3. After a hearing, an immigration judge (IJ) denied petitioner's application for asylum and ordered him removed to El Salvador. Pet. App. 9a-27a. The IJ found that petitioner's testimony was credible, *id.* at 21a, and that the conduct petitioner described was sufficient to demonstrate that he had "been persecuted by the gangs in El Salvador," *id.* at 22a. For two different reasons, however, the IJ concluded that petitioner had failed to "demonstrate that this past persecution was inflicted on account of his claimed membership in a particular social group." *Ibid.* (emphasis deleted); see *id.* at 22a-26a.

The IJ first determined that petitioner's proposed social group was "too tenuous" to qualify as a particular social group under the INA. Pet. App. 24a. The IJ stated that "[a]ccepting [petitioner's] designation would create a situation where virtually every non-criminal adolescent in El Salvador that was targeted by gang members would qualify for asylum in the United States." *Ibid.*

The IJ also concluded that, even assuming that petitioner is a member of a "particular social group," he "failed to show that he was persecuted *on account of* his alleged membership in this group." Pet. App. 24a. Petitioner had attempted to "distinguish[] his persecution from other accounts of forced recruitment by stating that he was persecuted because of his opposition to the

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[7] Petitioner also requested withholding of removal and protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See Pet. App. 10a. Those requests for relief are not at issue in this petition for a writ of certiorari. See Pet. 7 n.3.

gangs' violent and criminal activities, not simply because he refused to join." *Ibid.* The IJ determined, however, that that was "a distinction without a difference," and, in any event, she found there was "no independent evidence of record to support [petitioner's] assertion that he was persecuted for something more than his simple refusal to join a gang." *Ibid.*

4. Petitioner appealed to the BIA, which dismissed his appeal in a non-precedential, single-member order. Pet. App. 6a-8a. Citing its precedential decisions in *In re S-E-G-* and *In re E-A-G-*, the Board concluded that petitioner's proposed social group was "too broad and ill defined to constitute a discrete particular social group within the meaning of the" INA. *Id.* at 7a.

5. Petitioner filed a petition for judicial review of the BIA's order, which the court of appeals denied in an unpublished, per curiam decision. Pet. App. 1a-5a. Like the IJ and the BIA, the court of appeals concluded that petitioner's "proposed social group * * * [was] too broad and ill-defined to qualify as a 'particular social group'" under the INA. *Id.* at 3a. The court explained that petitioner "has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group." *Id.* at 4a. It also noted that "the proposed group is inchoate, as it is comprised of a potentially large and diffuse segment of El Salvadorean society." *Id.* at 4a-5a. Finally, the court of appeals stated that, "[t]o the extent that [petitioner] suggests that the Board's definition of 'particular social group' should not control here," the court "defer[ed] to [the BIA's] reasonable interpretation of that term." *Id.* at 5a.

ARGUMENT

Petitioner seeks further review of the court of appeals' holding that "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activity" do not constitute a "particular social group" under the INA's asylum provisions. Pet. App. 3a. The unpublished decision of the court of appeals in this case is correct, and it does not conflict with the decisions of any other court of appeals. In addition, to the extent that there is currently a disagreement among the circuits about the validity of the BIA's general approach to assessing "particular social group" claims, that conflict is lopsided and recently arising, and this case would be a poor vehicle for addressing it in any event. Accordingly, the petition for a writ of certiorari should be denied.

1. The BIA has long been of the view—and recently reaffirmed—that whether a proposed group qualifies as a "particular social group" must "be determined on a case-by-case basis." *In re C-A-*, 23 I. & N. Dec. 951, 955 (B.I.A. 2006) (quoting *In re Acosta*, 19 I. & N. Dec. 211, 234 (B.I.A. 1985)). Cf. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (stating that "[t]here is obviously some ambiguity in a term like 'well-founded fear,'" which is also used in the definition of "refugee," "which can only be given concrete meaning through a process of case-by-case adjudication").

No court of appeals has held that people who refuse to join a gang because they object to the gang's violent activities constitute a "particular social group" under the INA. Only one circuit has considered that question in published opinions, and it has repeatedly reached the same conclusion as the Fourth Circuit reached in its unpublished decision in this case. See *Barrios* v.

Holder, 581 F.3d 849, 854 (9th Cir. 2009) (declining to recognize group consisting of "young males in Guatemala who are targeted for gang recruitment but refuse because they disagree with the gang's criminal activities"); *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 861-862 (9th Cir. 2009) ("young Honduran men who have been recruited by the MS-13, but who refuse to join"); *Santos-Lemus* v. *Mukasey*, 542 F.3d 738, 745-746 (9th Cir. 2008) ("young men in El Salvador resisting gang violence"). Four other circuits have rejected similar claims in unpublished decisions.[8] Even the circuit whose decisions form the sole basis for petitioner's claim of a circuit conflict has stated—in one of the very decisions on which petitioner relies—that it has "no quarrel with" the view that "young Honduran men who resist being recruited into gangs" do not constitute a "particular social group." *Gatimi* v. *Holder*, 578 F.3d 611, 616 (7th Cir. 2009) (citing *Ramos-Lopez*, *supra*). There is thus no conflict in the circuits with respect to the specific question presented in this case.[9]

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[8] See *Zavaleta-Lopez* v. *Attorney Gen. of United States*, No. 08-3673, 2010 WL 125852, at *1 (3d Cir. Jan. 14, 2010) (per curiam) ("young men who have been targeted by gangs for membership and who have refused to join gangs"); *De Vasquez* v. *United States Att'y Gen.*, 345 Fed. Appx. 441, 445-447 (11th Cir. 2009) (per curiam) ("poor girls who come from fatherless homes, with no adult male protective figures . . . who resist recruitment or criticize [a criminal gang in El Salvador called] Maras") (citation omitted); *Cua-Tumax* v. *Holder*, 343 Fed. Appx. 995, 997 n.7 (5th Cir. 2009) (per curiam) ("Guatemalan youths who resist gang recruitment"); *Vasquez* v. *Holder*, 343 Fed. Appx. 681, 682 (2d Cir. 2009) ("individuals who have been actively recruited by gangs, but who have refused to join because they oppose the gangs").

[9] The Sixth Circuit recently concluded that "former gang members" who cannot "leave save by rejoining the organization" constitute a "particular social group" for purposes of triggering eligibility for

2. Petitioner argues (Pet. 9-14) that the decision of the court of appeals in this case deepens a conflict in the circuits about the more general question of the role of "social visibility" and "particularity" in determining whether an applicant for an asylum has carried his burden of demonstrating membership in a particular social group. That claim does not warrant this Court's review.

a. As an initial matter, the Fourth Circuit's brief and unpublished decision in this case does not establish binding precedent for future cases. Thus, although the Board is entitled to considerable deference when interpreting a vague and open-ended statutory term such as "particular social group," see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), it remains open to litigants within the Fourth Circuit to argue that the BIA's approach to these issues is impermissible and does not merit deference by the courts.

b. To the extent there is currently a conflict among the circuits about the permissible methodology for evaluating "particular social group" claims, that conflict is both lopsided and less well-developed than petitioner suggests. Petitioner himself asserts that the split in the

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withholding of removal. *Urbina-Mejia* v. *Holder*, No. 09-3567, 2010 WL 743845, at *1 (Mar. 5, 2010). As a concurring judge observed, however, that conclusion was unnecessary to the court's decision, because the Sixth Circuit ultimately concluded that the alien in question was ineligible for withholding of removal because he had previously committed a "serious nonpolitical crime." *Id.* at *8 (Siler, J., concurring) (quoting 8 U.S.C. 1231(b)(3)(B)(iii)); see *id.* at *7-*8. In any event, *Urbina-Mejia* involved former gang members—a group that is likely to be smaller and may be easier to define than one consisting of those who resisted joining a gang because they objected to the nature of the gang's activities. See *Benitez Ramos* v. *Holder*, 589 F.3d 426, 428, 429 (7th Cir. 2009) (concluding that a former gang member who had gang-related tattoos on his face was a member of a "particular social group" for purposes of seeking withholding of removal).

circuits is 8-1 against his position, see Pet. 10-12, with the other two regional circuits having "signaled * * * approval" of or "hint[ing]" that they might adopt the majority view, Pet. 13.

Petitioner also overstates the clarity of the law in the lower courts. In addition to the Fourth Circuit, three other regional circuits have addressed the issue only in unpublished opinions. See Pet. 12-13 (citing unpublished decisions from the Third, Fifth, and Tenth Circuits).[10] In addition, the Sixth Circuit's decision in *Al-Ghorbani* v. *Holder*, 585 F.3d 980 (2009), did not actually turn on either the particularity or the social visibility criterion. See *id.* at 994-997. It is thus not accurate to state (Pet. 13) that the "overwhelming majority of the circuits have squarely addressed the issue," and this Court's review would be premature at this time.

c. Petitioner is correct that two recent Seventh Circuit decisions have criticized the BIA's "social visibility" criterion and that the second of those decisions appeared to criticize the Board's "particularity" criterion as well. See Pet. 10-12 (discussing *Gatimi*, *supra*, and *Benitez Ramos* v. *Holder*, 589 F.3d 426 (7th Cir. 2009)). As noted previously, however, *Gatimi* actually undermines petitioner's contention that he is eligible for asylum, because it states that the Seventh Circuit "ha[s] no quarrel with the" view that "young Honduran men who resist being recruited into gangs" do not constitute a particular social group. 578 F.3d at 616. In addition, the Seventh Circuit's discussion of these issues in *Benitez*

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[10] Petitioner also cites the Eleventh Circuit's nonprecedential decision in *De Vasquez* v. *United States Att'y Gen.*, 345 Fed. Appx. 441 (2009), but that court accepted the Board's particularity and social visibility criteria in its earlier published decision *Castillo-Arias* v. *United States Att'y Gen.*, 446 F.3d 1190 (2006), which affirmed the BIA's decision in *In re C-A-*, 23 I. & N. Dec. 951, 956 (B.I.A. 2006).

Ramos was dicta, because the court had already concluded that it would "violat[e] * * * the *Chenery* doctrine" for it to affirm the BIA's decision based on the social visibility criterion. 589 F.3d at 430.

The Seventh Circuit's criticisms of the BIA's approach to these issues also rest on incorrect premises. First, the Seventh Circuit stated in *Gatimi* that the Board has not "attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility" and that the Board "has been inconsistent rather than silent" because it has not "repudiat[ed]" earlier decisions that recognized particular social groups without referring to social visibility. 578 F.3d at 615-616. But the Seventh Circuit in *Gatimi* did not discuss the BIA's 2006 precedential decision in *In re C-A-*, which explained that the Board's previous "decisions involving social groups *have* considered the recognizability, i.e., the social visibility of the group in question," and that the "particular social group[s]" previously recognized by the Board "involved characteristics that were highly visible and recognizable by others in the country in question." 23 I. & N. Dec. at 959-960 (emphasis added). *Gatimi* likewise did not discuss the Board's precedential decision in *In re A-M-E-*, which described *In re C-A-* as having "*reaffirm[ed]* the requirement that the shared characteristic of the group should generally be recognizable by others in the community," 24 I. & N. Dec. 69, 74 (B.I.A. 2007) (emphasis added), or the Board's more recent precedential decision in *In re S-E-G-*, which contains a detailed discussion of the Board's views regarding social visibility and particularity. See pp. 4-5, *supra* (discussing *S-E-G-* and the Board's companion decision in *In re E-A-G-*).

Second, *Gatimi* and *Benitez Ramos* were based on the incorrect premise that the BIA views its "social visi-

bility" criterion as requiring that members of a particular social group must literally be visible to the naked eye. See *Benitez Ramos*, 589 F.3d at 430 (describing the BIA's view as being "that you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street"); *Gatimi*, 578 F.3d at 616 ("The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'"). Although it appears that the government's briefs and oral argument in those cases may have contributed to the confusion, see *Benitez Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616, that crabbed interpretation is not required by the Board's precedential decisions.

In its precedential decision in *In re E-A-G-*, the BIA defined "social visibility" as "the extent to which members of a society perceive those with the characteristic in question as members of a social group." 24 I. & N. Dec. 591, 594 (B.I.A. 2006). Consistent with that statement, the Board's precedential decisions have equated "social visibility" with the extent to which the relevant society perceives there to be a group in the first place, rather than the case with which one may necessarily be able to identify particular individuals as members of such a group. See *In re S-E-G-*, 24 I. & N. Dec. at 586-588 (discussing "general societal perception" and finding little evidence that Salvadoran youth who resist gang recruitment "would be 'perceived as a group' by society"); *In re A-M-E-*, 24 I. & N. Dec. at 74 (finding little evidence that "wealthy Guatemalans" "would be recognized as a group that is at a greater risk of crime

in general or extortion or robbery in particular").[11] And in *In re Kasinga*, the Board recognized a group of women who had not yet been subject to FGM and who opposed the practice as constituting a particular social group, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996), two characteristics that also are not necessarily outwardly visible.

3. In any event, even if there were a conflict in the circuits that presently warranted this Court's review (and there is not), this case also would not be an appropriate vehicle for addressing it.

First, it is difficult to see how petitioner's proposed social group—one based on resistance to gang recruitment—would fit within the "particular social group" category no matter how that category is defined. As the IJ explained, accepting petitioner's argument would threaten to "create a situation wherein virtually every non-criminal adolescent in El Salvador that was tar-

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[11] This understanding of the "social visibility" requirement is also supported by an agency decision that was later vacated by the Attorney General in anticipation of regulations that have never been finalized, but that remains instructive even if non-precedential. See note 6, *supra*. Although the BIA had not yet coined the shorthand phrase "social visibility" at the time of its decision in *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999), the Board's decision in that case addressed this criterion under the heading of "Cognizableness." *Id.* at 917-920. The Board explained that the purported group must be "recognized and understood" as a separate "societal faction" by the population of the relevant country, and the Board stated that the analysis included whether members of the putative group "view themselves as members of this group" and whether "their * * * oppressors see their victim[s] as part of this group." *Id.* at 918. The Board did not, however, require that individual members of a group be immediately recognizable, but rather focused on whether "distinctions [are drawn] within [the pertinent] society between those who share and those who do not share the characteristic." *Id.* at 919.

geted by gang members would qualify for asylum in the United States." Pet. App. 24a; see *In re C-A-*, 23 I. & N. Dec. at 960-961 (refusing to recognize a "particular social group" whose membership would not be much "narrower than the general population" of the relevant country). Even the Seventh Circuit appears to have "no quarrel with" the view that claims such as petitioner's should ultimately fail. *Gatimi*, 578 F.3d at 616.

Second, petitioner is no longer a member of the social group that he proposed. Petitioner defined his proposed social group as "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities." Pet. App. 22a. But petitioner is currently 24 years old, see Administrative Record 425 (giving petitioner's date of birth as October 14, 1985), and is thus no longer an "adolescent[]" under any conceivable definition of that term. Although the BIA has recognized that the prospect of an alien's aging out of a "particular social group" presents unique interpretative questions, it has not yet taken a definitive position about how those questions should be approached or resolved. See *In re S-E-G-*, 24 I. & N. Dec. 579, 583-584 (B.I.A. 2008). Cf. *Ixtlilco-Morales* v. *Keisler*, 507 F.3d 651, 655 (8th Cir. 2007) (affirming agency determination that alien's increase in age was a "fundamental change in personal circumstances" that rebutted the presumption of a well-founded fear of future persecution created by the past abuse he suffered as a child). In addition, the issue was not considered by the BIA or the court of appeals in this case, notwithstanding the fact that petitioner was already 23 years old at the time of both of those decisions. See Pet. App. 1a, 6a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 09-830

In the Supreme Court of the United States

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 09-830

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
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v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In its brief in opposition, the government does not dispute that, by virtue of the Seventh Circuit's decisions in *Gatimi* v. *Holder*, 578 F.3d 611 (2009), and *Ramos* v. *Holder*, 589 F.3d 426 (2009), there is a circuit conflict concerning the validity of the BIA's social-visibility and particularity requirements. The government also does not dispute the broader proposition that lower courts have long struggled with the definition of "particular social group" for purposes of eligibility for asylum under the INA. See, *e.g.*, *Fatin* v. *INS*, 12 F.3d 1233, 1238 (3d Cir. 1993) (Alito, J.). Finally, the government does not dispute that the question of whether a group must be "socially visible" and "particularized" in order to qualify as a "particular social group" is one of exceptional impor-

tance to the administration of the immigration system. Instead, the government offers a series of arguments as to why that question does not warrant review in this factual context or in this case. Those arguments are individually and collectively insubstantial. The Court should grant review to resolve the clear circuit conflict concerning the interpretation of a central provision of the immigration laws.

A. The Decision Below Deepens A Circuit Conflict Concerning The Definition Of "Particular Social Group"

1. The government essentially concedes that there is a circuit conflict concerning the validity of the BIA's social-visibility and particularity requirements. See Br. in Opp. 8, 11. As explained in the petition, the Seventh Circuit's decisions in *Gatimi* and *Ramos* do not merely "criticize[]" those requirements, see *id.* at 11; they reject them outright, see Pet. 10-12.[1] By contrast, leaving the government's numerative quibbles aside, see Br. in Opp. 11 & n.10, it is clear that the majority of circuits to have addressed the issue have upheld the social-visibility and particularity requirements. See Pet. 12-13.

With regard to *Gatimi* and *Ramos*, the government contends (Br. in Opp. 12-14) that those decisions are incorrect because they rest on an erroneous understanding of the BIA's social-visibility requirement: *viz.*, that the BIA requires a showing that the common characteristic

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[1] The government contends (Br. in Opp. 11-12) that the discussion of the social-visibility requirement in *Ramos* was dictum because the Seventh Circuit recognized that the BIA had not relied on it in the decision under review. The Seventh Circuit, however, had already rejected the social-visibility requirement in *Gatimi*, see 578 F.3d at 614-616, and it proceeded to reject the particularity requirement in *Ramos*, see 589 F.3d at 430-431.

be one that is visible to members of society, rather than one that is shared by a group perceived by society to exist. As a preliminary matter, the government's contention is ironic in the extreme, because it specifically advanced the allegedly erroneous understanding of the social-visibility requirement before the Seventh Circuit. See, *e.g.*, *Ramos*, 589 F.3d at 430; *Gatimi*, 578 F.3d at 616. And the BIA has articulated that same understanding in its decisions. See, *e.g.*, *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A.), review denied *sub nom. Castillo-Arias* v. *U.S. Attorney General*, 446 F.3d 1190 (11th Cir. 2006), cert. denied, 549 U.S. 1115 (2007).[2] Not surprisingly, therefore, circuits that have *upheld* the social-visibility requirement have understood it in exactly the same fashion. See, *e.g.*, *Ramos-Lopez* v. *Holder*, 563 F.3d 855, 862 (9th Cir. 2009); *Scatambuli* v. *Holder*, 558 F.3d 53, 59 (1st Cir. 2009). The bottom line is that there is a clear circuit conflict concerning whether an alien must satisfy the social-visibility requirement (and the accompanying particularity requirement) to establish the existence of a "particular social group."

Indeed, the conflict among the circuits has only deepened since the filing of the petition for certiorari. Although the Sixth Circuit had seemingly endorsed the BIA's social-visibility and particularity requirements in an earlier opinion, see *Al-Ghorbani* v. *Holder*, 585 F.3d 980, 994 (2009), it has since held that former gang members would constitute a "particular social group." See

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[2] Although the government criticizes the Seventh Circuit (Br. in Opp. 12) for not discussing *C-A-* in *Gatimi*, the Seventh Circuit did so in *Ramos*—and concluded that *C-A-* "especially" supported the understanding of the social-visibility requirement that the government was advancing. See 589 F.3d at 430.

Urbina-Mejia v. *Holder*, 597 F.3d 360, 365-367 (2010). Given the Sixth Circuit's express reliance on *Gatimi* and *Ramos*, it now appears that the Sixth Circuit has also rejected the BIA's social-visibility and particularity requirements—further confirming the need for this Court's intervention.

2. In opposing certiorari, the government primarily contends that the Court's review is not warranted because there is no circuit conflict concerning whether "people who refuse to join a gang because they object to the gang's violent activities constitute a 'particular social group' under the INA." Br. in Opp. 8. As the Solicitor General is well aware, however, this Court grants review to resolve conflicts on questions of federal law—not on the application of federal law to particular facts. See S. Ct. R. 10. Although the government contends that "whether a proposed group qualifies as a 'particular social group' must be determined on a case-by-case basis," Br. in Opp. 8 (internal quotation marks and citation omitted), that is always true when a given legal standard is applied in different factual contexts.

It would be passing strange for the Court to refrain from granting review until there is a circuit conflict on the particular question whether Salvadoran youths who refuse to join gangs because of their opposition to the gangs' violent activities qualify as a "particular social group"—just as the Court did not wait for a conflict on the particular question whether the First Amendment protects a student's right to hold up a banner reading "BONG HiTS 4 JESUS" during an Olympic torch relay. See *Morse* v. *Frederick*, 551 U.S. 393, 397-400 (2007). Because the BIA has indisputably adopted the social-visibility and particularity requirements as part of the legal standard for determining "membership in a particular social group," the government does not have the

prerogative to rewrite the question presented in a way that limits it to the facts.

3. Instead, the key question for purposes of certiorari is whether resolution of the circuit conflict on the legal standard would be outcome-dispositive here. It plainly would be, notwithstanding the government's efforts to suggest otherwise. As a result of its rejection of the social-visibility and particularity requirements, the Seventh Circuit applies the BIA's preexisting standard, which focuses on whether the members of the proposed group share an immutable characteristic. See, *e.g.*, *Ramos*, 589 F.3d at 428 (citing, *inter alia*, *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), overruled in part on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)). Notably, the BIA has already indicated that the very group at issue here would satisfy the immutability requirement. See *In re S-E-G-*, 24 I. & N. Dec. 579, 584 (B.I.A. 2008).[3]

The government's contrary argument (Br. in Opp. 9, 11, 14-15) rests on a passing citation in *Gatimi* of a Ninth Circuit decision rejecting a similar proposed group. See *Gatimi*, 578 F.3d at 616 (citing *Ramos-Lopez*, *supra*). In that decision, however, the Ninth Circuit expressly noted that, in *S-E-G-*, the BIA recognized that such a group *would* satisfy the immutability requirement (before proceeding to conclude that it would fail the social-visibility and particularity requirements). *Ramos-Lopez*, 563 F.3d at 860. And in its subsequent decision in *Ramos*, the Se-

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[3] Since the filing of the petition for certiorari, the United Nations High Commissioner for Refugees (UNHCR) has similarly noted that opposition to a gang's violent activities "may be considered irreversible and thus immutable." UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 13 (Mar. 2010).

venth Circuit held that former gang members would constitute a "particular social group," see 589 F.3d at 429-431—a proposed group that cannot be distinguished from the group at issue here (at least without devising still more novel requirements for group status, see Br. in Opp. 10 n.9). Because the choice of the appropriate legal standard would be outcome-dispositive in this case, it is an optimal vehicle for resolution of the circuit conflict.

4. The government identifies two other potential vehicle problems with this case. Both are invalid.

a. The government contends that the Court should deny review because the Fourth Circuit's decision in this case was "brief and unpublished." Br. in Opp. 10. The government does not dispute, however, that the Fourth Circuit unambiguously held that the BIA's adoption of the social-visibility and particularity requirements was entitled to deference—and that the proposed group failed both requirements. See Pet. App. 4a-5a. It would be one thing if petitioner were contending that the Fourth Circuit was the only circuit to have upheld the social-visibility and particularity requirements. But it is quite another where, as here, there is a preexisting circuit conflict with published decisions on both sides. The Court routinely grants certiorari to review unpublished decisions in these circumstances. See, *e.g.*, *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181 (2010); *Boyle* v. *United States*, 129 S. Ct. 2237 (2009); *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886 (2009); *Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 129 S. Ct. 846 (2009).

b. The government also contends that the Court should deny review because "petitioner is no longer a member of the social group that he proposed," on the ground that he is now 24 years old and thus no longer an adolescent. Br. in Opp. 15. But the government does not appear to have raised that argument before the immi-

gration judge (when, as of the date of decision, petitioner was 20), the BIA (when he was 23), or the court of appeals (when he was a day short of 24), and none of those adjudicators addressed such an argument in their decisions. Just as it is improper for a court of appeals to consider a justification for denial on which the BIA did not rely, see, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 185-187 (2006) (per curiam), it would be improper for this Court to deny review here based on a justification on which *neither* the BIA *nor* the court of appeals relied. In any event, such an argument would lack merit, because the BIA has taken the position that "the mutability of age is not within one's control"—and, as a result, "a claim for asylum may still be cognizable" as long as "an individual has been persecuted in the past on account of an age-described particular social group." *S-E-G-*, 24 I. & N. Dec. 583-584.

B. The Court Of Appeals' Decision Is Erroneous

1. Leaving aside the almost laughable suggestion that the BIA's social-visibility and particularity requirements constitute nothing more than a "restate[ment]" of the preexisting immutability requirement, see Br. in Opp. 3, the government offers no defense of the social-visibility and particularity requirements on the merits. That is for good reason, because there is no basis in the text of Section 1101(a)(42)(A) for either requirement. As explained in the petition, those requirements cannot be justified by resort to the interpretive canon of *ejusdem generis*, because neither social visibility nor particularity is a shared feature of the other bases for persecution identified in Section 1101(a)(42)(A). See Pet. 15-16. Nor is there a reasoned explanation for those requirements. See Pet. 16-17. And although the government implies that the social-visibility and particularity requirements

are derived from guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), see Br. in Opp. 4,[4] those guidelines—which interpret the international agreements on which Section 1101(a)(42)(A) was based—make clear that an applicant for asylum need only satisfy the immutability requirement in order to establish the existence of a "particular social group." See Pet. 19-20; UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs* 12 (Mar. 2010) (*Guidance Note*).

Perhaps most importantly, the government fails to reconcile the BIA's more recent decisions adopting the social-visibility and particularity requirements with its earlier decisions recognizing "particular social groups" without reference to those requirements. Although the government suggests that some of the groups at issue in the earlier decisions would have satisfied those requirements, see Br. in Opp. 2-3, it makes no such effort with regard to other groups, such as women opposed to genital mutilation. See *In re Kasinga*, 21 I. & N. Dec. 357, 365-366 (B.I.A. 1996). Nor is it readily possible to see how a group such as women opposed to genital mutilation could satisfy the social-visibility requirement—at least as it has been articulated in *C-A-* and other more recent BIA decisions—because, as the government seemingly concedes (Br. in Opp. 14), the shared characteristic of that group is not necessarily "highly visible and recognizable by others." *C-A-*, 23 I. & N. Dec. at 960; see

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[4] But see Gov't Supp. Letter Br. at 10, *Orellana-Monson* v. *Holder*, No. 08-60394 (5th Cir. Nov. 18, 2009) (conceding that "[t]he [BIA] was not purporting to adopt the [UNHCR's] specific social group formulation" and asserting that the BIA was not "required to adopt the UNHCR's approach").

Zsaleh E. Harivandi, Note, *Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum*, 95 Corn. L. Rev. 599, 612 (2010) (explaining that, "[i]n the cases of both women who have already undergone [genital mutilation] and those who have not, the visibility requirement of the social-group category presents a problem"). As a result, the BIA's adoption of the social-visibility and particularity requirements is not entitled to deference, either because the BIA has taken inconsistent positions or because it has changed position without explanation. See Pet. 18.

Perhaps recognizing that problem, the government now takes the position that the social-visibility requirement requires a showing not that the common characteristic be one that is visible to members of society, but rather only one that is shared by a group perceived by society to exist. See Br. in Opp. 12-14; pp. 2-3, *supra*. As a preliminary matter, the court of appeals appears to have applied the former, more stringent definition of social visibility in rejecting petitioner's claim, see Pet. App. 4a (quoting *Scatambuli*, 558 F.3d at 59), and the BIA has done so with regard to both the proposed group at issue here and other proposed groups, see *In re E-A-G-*, 24 I. & N. Dec. 591, 594-595 (B.I.A. 2008); see *In re A-T-*, 24 I. & N. Dec. 296, 303 (B.I.A. 2007), vacated on other grounds, 24 I. & N. Dec. 617 (2008); *C-A-*, 23 I. & N. Dec. at 960. And it seems likely that petitioner's proposed group would actually satisfy the latter definition, because members of Salvadoran society would perceive those who refuse to join a gang because of opposition to the gang's violent activities as a group. See UNHCR, *Guidance Note* 14-15. Insofar as the government effectively concedes that the court of appeals applied an incorrect version of the social-visibility requirement in this case, the decision below should be reversed outright on

that basis alone. But more broadly, the evident uncertainty concerning the meaning of the social-visibility requirement merely underscores the bankruptcy of the BIA's approach (and the inappropriateness of *any* social-visibility requirement). At a minimum, therefore, this Court should grant plenary review and reverse the Fourth Circuit's erroneous decision upholding the social-visibility and particularity requirements.

C. The Question Presented Is An Important And Recurring One That Merits The Court's Review

1. The government does not dispute that the question presented in this case is one of obvious importance to the administration of the immigration system. Nor could it, given its previous recognition that courts are confronted with thousands of petitions for review in asylum cases annually and that questions concerning the standards of eligibility for asylum therefore recur with considerable frequency. See Pet. at 21, 23, *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (No. 05-552).

2. Notwithstanding the resulting circuit conflict, the government did not seek certiorari in *Gatimi* or *Ramos*. To the contrary, since those decisions, the government appears to be engaging in a deliberate effort to avoid further decisions in the courts of appeals addressing the validity of the social-visibility and particularity requirements—whether out of concern that circuits that had previously upheld those requirements will reverse course and follow the Seventh Circuit, or out of concern that further decisions on the issue could trigger this Court's review. One example is particularly instructive.

As noted in the petition (at 13), the Fifth Circuit recently issued an opinion that signaled its approval of the social-visibility and particularity requirements. See *Orellana-Monson* v. *Holder*, 332 Fed. Appx. 202, 203

(2009) (No. 08-60394). After the applicants for asylum sought rehearing en banc based on *Gatimi*, the Fifth Circuit withdrew the opinion and granted panel rehearing. See Order on Pet. for Reh'g En Banc at 1, *Orellana-Monson*, *supra* (Dec. 17, 2009). A week before oral argument, the government, having previously defended the social-visibility requirement in numerous briefs in the case, abruptly reversed course and declared it would no longer do so because it had come to the realization that the BIA had not in fact relied on that requirement in the decision under review. See Gov't Letter at 1, *Orellana-Monson*, *supra* (Feb. 22, 2010). In light of the government's last-minute change in position, the Fifth Circuit remanded to the BIA for clarification. See *Orellana-Monson*, *supra* (Mar. 15, 2010), slip op. 3.

We respectfully submit that, as long as the BIA continues to apply the social-visibility and particularity requirements, the government should be willing to face the music and defend those requirements in the courts—including this Court. There is a clear circuit conflict on the validity of those requirements, and this case is in all respects an optimal vehicle in which to consider the issue. The Court should grant review here in order to resolve the circuit conflict and restore the correct interpretation of a vitally important provision of the immigration laws.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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